

THE FOCUSED ATTENTION OF OTHERS: A CONCEPTUAL AND NORMATIVE MODEL OF PERSONAL AND LEGAL PRIVACY

I. The Right to Be Let Alone

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹

Justice Brandeis saw the Constitution as conferring a substantive right that is both the most comprehensive, and most the most valued, of any in the document. What is this remarkable right? In the narrow context of *United States v. Olmstead*, it appears to be the Fourth Amendment right to be free from unreasonable search or seizure. But Brandeis made a very similar argument in many of the same words thirty years earlier in a very famous and influential law journal article.² In this earlier context the right is specifically identified as the right to privacy. In both the law journal, where the focus was on the development of civil protection of privacy, and the constitutional case dealing with the Fourth Amendment, Brandeis characterized privacy in Judge Cooley's terms - the right to be let alone. What do we mean by a right to be let alone?

Except for a few very eccentric, and sometimes dangerous, individuals, no one desires to be let entirely alone. Humans need friends, family, and social interaction. Life, liberty, property, and happiness all depend on deeply complex social, commercial, legal, and moral interactions. A culture, and this is probably an oxymoron, of hermits and recluses is the last thing civilized men or women would desire. But, of course, Justice Brandeis knew this all along. The right to be let alone was never imagined to be a normative directive to let individuals totally alone. It articulates a value in letting people alone, in certain kinds of ways, and in limited contexts. Exactly what these kinds of ways that people are entitled to be let alone are, or what precisely the contexts in which this entitlement holds, are the subject of great moral, legal, and constitutional controversy.

In addition to his provocative identification of privacy with an entitlement to be let alone, Justice Brandeis makes a comparative assertion. Not only is an individual's interest in personal and constitutional privacy identified as a right, it is given pride of place as the most comprehensive and valued of rights. This seems unlikely; privacy is not, nor has it ever been, the most valued of possible rights. Most citizens, sad to say, don't think enough about moral or legal rights to have an opinion one way or another. Those who do are as likely to identify the Second Amendment, or a collective community right to law and order, as the most valuable. Even as thoughtful and distinguished a jurist as Justice Black expresses an almost dismissive evaluation of the importance of privacy.

The Court talks about a constitutional “right of privacy” as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the “privacy” of individuals. But there is not. . . . I like my privacy as well as the next one, but I am compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.³

Justice Brandeis’ concerns were not empirical, nor ethnographic. His extraordinary claim is a normative one. Privacy is a central, and perhaps essential, value in a genuinely liberal society. I think he is quite correct in this judgment. This remains bitterly controversial, however, not just because all normative and academic theses are controversial, but because we have such a fragile and imperfect understanding of the nature of personal and legal privacy, and an equally unclear vision of its social, legal, and moral importance. An entitlement to be let alone is an intriguing normative directive in a liberal society, but one that raises as many questions as it answers. In what sense are citizens entitled to be let alone? And by whom? And in what contexts? An adequate theory of privacy must provide at least the bare outlines to these basic questions. Further, assuming we can reach some consensus about the nature of privacy, there remain difficult questions about the sacrifices society can be expected to make in order to respect individual privacy. Honoring personal privacy exacts a very real social cost. How can we ever engage in the reflective balancing of the costs and benefits of protecting privacy when we have such a sketchy understanding of its place in the larger array of values and rights in contemporary liberal society?

My hope in the discussion to follow is at the same time unrealistically ambitious, and cautiously modest. The modesty comes from the fact that I advocate no significant legal or conceptual change, and because, though I have strong feelings, which I make no special attempt to disguise, on the substantive moral, legal, and constitutional questions which surround privacy, I in no way see my own substantive views as any kind of logical outgrowth of my analysis. The ambition comes from the conceit of offering yet another model or analysis of personal and legal privacy. Over forty years ago, Judge Biggs colorfully described the privacy literature as "a haystack in a hurricane."⁴ The ensuing decades have seen a profusion of scholarly attention, and many new competing definitions, but nothing remotely resembling consensus. I put forward an analysis of privacy here that is "mine" only in the sense that I take the credit and blame for the particular articulation and argumentative defense before you. I believe that it is implicit, and sometimes explicit, in the work of a number of scholars. I am confident that it is conceptually superior to competing models, but I have no illusions that it possesses some kind of magical analytic clarity that will immediately win over advocates for rival understandings of privacy. My hope is that the community of scholars toiling in the fields of privacy will find some use for a somewhat systematic examination of recent developments, and for a concrete proposal for consideration and review.

II. Semantic Legislation

Defining privacy requires a familiarity with its ordinary usage, of course, but this is not enough since our common ways of talking and using language are

riddled with inconsistencies, ambiguities, and paradoxes. What we need is a definition which is by and large consistent with ordinary language, so that capable speakers of English will not be genuinely surprised that the term "privacy" should be defined in this way, but which also enables us to talk consistently, clearly, and precisely about the family of concepts to which privacy belongs.⁵

Since its very beginnings as a written discipline, philosophy has seen itself as fundamentally concerned with the analysis of thought and language. This often leads to the caricature that philosophers only care about words. Not true, of course. We want to understand the nature of a concept like privacy, not because we want to compile new dictionary entries, but because we care about privacy, and laws and public policies that may enhance or threaten our privacy. But, some better understanding of privacy seems required for an informed and productive debate about those laws and public policies. And it is hard to see how such conceptual improvement could come about without careful scholarly attention by philosophers, social scientists, and academic lawyers.

Natural language is at times vague, ambiguous, and unclear. Speakers misuse language. Occasionally what appears to be a substantive dispute turns out to nothing more than a simple linguistic misunderstanding. It is hardly surprising, therefore, that scholars professionally trained to pay attention to language grow impatient and advocate linguistic reform and greater linguistic care. The concept of privacy seems a natural for this sort of conceptual revision. W. A. Parent in the quote above is unapologetic in his call for a more precise definition of privacy.

Let us assume that Professor Parent's call for linguistic reform is more than a rhetorical voice. He is concerned, as are many privacy scholars, with rampant inconsistency, ambiguity, and paradox, in the colloquial and legal usage of the concept of privacy. He proposes, therefore, a reformed definition of privacy that eliminates contradictory wordings, and resolves vague and ambiguous usages into clear and precise ones. I am convinced that this sort of semantic legislation, no matter how well intentioned or easily sympathized with, is a futile philosophical undertaking. There is clear value, of course, in scrupulously calling attention to ambiguity, vagueness, and contradiction. If privacy is guilty of these conceptual sins (and I suspect most every interesting concept is to some degree), then there is an analytic obligation to point them out, and perhaps even to suggest ways of dealing with the problems. But taking language that is widely used in inconsistent or ambiguous ways, or worrying about concepts that admit of borderline cases, and artificially redefining them by mandating a new, consistent, univocal, and precise usage is a waste of philosophical time and effort.

Linguistic usage is certainly malleable. But conceptual change is the product of generations of gradually evolving linguistic habits, not an abrupt, overnight cessation of old ways of thinking and speaking, and the adoption of new philosophically mandated ones to replace them. I claim as a simple matter of empirical fact that such immediate linguistic change is psychologically and anthropologically impossible. This fact, alone, has to raise serious doubts about

the whole approach of semantic legislation as a way of understanding philosophical analysis.

Perhaps even more problematic for this perspective, however, is that semantic legislation would typically prove to be normatively futile. The problem here is that philosophical analysis of normative concepts like privacy rarely takes place independently of larger political and moral questions. Definitions of privacy are often used as premises in arguments for social and legal policies. And the debates about these policies are always contentious. Any recommended conceptual “improvement” will be readily embraced by partisans whose position will be enhanced by the proposed semantic legislation. But those on the opposite side, if they have their wits about them, will reject the proposal as not being an improvement at all, but rather as begging-the-question against them. The existing substantive debate will find itself recast as a conceptual disagreement. And this is to be deplored, not simply because it will prove to be every bit as controversial as the original policy dispute, but also because it actually mischaracterizes the real nature of the fight, and thus makes it even less likely that the opposing positions can find room for compromise, let alone resolution.

III. Information Models of Privacy

Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.⁶

A. Privacy and Information

In a literature that is often characterized as a complete absence of scholarly consensus, one finds surprising agreement concerning the centrality of information to the concept of personal privacy. Although there is an initial plausibility to the claim that epistemological concepts like information, data, and knowledge form the analytic core of privacy, I contend that privacy should be understood in a very different fashion. One part of my argument will be to show that there are many standard uses of privacy where informational concerns are either completely absent, or can only be included in artificial and contrived ways. I will concede that there are many other instances, however, where information does seem to be center stage. My strategy, here, will be to suggest that although in these latter cases information and privacy are connected, the linkage is contingent, and neither analytically nor normatively central.

The following is an example of a recent theory of privacy that received some scholarly attention in the 1980s. I intend to be brutally harsh on it, but I must confess at the outset that it has great initial plausibility, and certainly possesses the theoretical virtues of clarity and elegance. Nevertheless, I believe it can be shown to be conclusively false. Perhaps falsity is an inappropriate charge, since Parent is candidly involved in semantic legislation. Still, since he admits desiring a theory that is "by and large consistent with ordinary language," and one that "enables us to talk clearly and precisely about the family of concepts to which privacy belongs,"⁷ I think it is fair to submit the theory to the challenge of potential counter-examples.

Privacy is the condition of not having undocumented personal knowledge of one possessed by others. A person's privacy is diminished exactly to the degree that others possess this kind of knowledge about him. . . . [P]ersonal information . . . [should] be understood to consist of *facts* about a person which most individuals in a given society do not want widely known about themselves.⁸

As admirably clear as this model first appears, there are at least four components that demand further clarification. Parent uses the concepts of knowledge and information as virtually synonymous. In colloquial speech this is reasonable enough, but in most philosophical contexts there are distinctions that deserve at least some mention. Information, or facts, are impersonal, and although the data exists, it is quite possible that no one is aware of it. I may "possess" a good deal of information about climate conditions in South America by owning a handy-dandy computer encyclopedia, though I never consult the relevant entries. The F.B.I. may possess a good deal of data about you in one of their seldom accessed files. Knowledge, however, is a much more dynamic epistemological concept. According to what is sometimes called the standard analysis, to know something is to believe it, and to have good evidence for it, and for it to be true. For Parent, as well as many of the information models, it is unclear whether information or knowledge is the real concern. Has the F.B.I. violated your privacy if it has all the data about you, but never accesses it? Not even the clerks who enter it? Every one of us, even the most radical privacy hawks, would care more if the inappropriate personal data was known –

believed, thought about, considered, etc. – by others, than if it was just mechanically compiled. This should alert us to something important, I believe.

Obviously not any old question about you or your person counts as **personal**. Privacy, according to Parent, protects personal information. His working definition of personal information is a helpful blend of example and generalized conceptual description.

In contemporary America facts about a person's sexual preferences, drinking or drug habits, income, the state of his or her marriage and health belong to the class of personal information. Ten years from now some of these facts may be a part of everyday conversation; if so their disclosure would not diminish individual privacy. [P]ersonal information . . . [is] a function of existing cultural norms and social practices.⁹

So far, so good. But then comes a surprising addition to the category of personal information. One that at first just seems eccentric, but I believe is symptomatic of a more serious conceptual malady.

[We must] accommodate a particular and unusual class of cases of the following sort. Most of us don't care if our height, say, is widely known. But there are a few persons who are extremely sensitive about their height (or weight or voice pitch). They might take extreme measures to ensure that other people do not find it out. For such individuals height is a very personal matter. Were someone to find it out by ingenious snooping we should not hesitate to talk about an invasion of privacy.¹⁰

I think we would, indeed, describe this example as an invasion of privacy, but not because the information has idiosyncratically become personal, but rather because there has been ingenious, and we assume inappropriate, **snooping**.

Once again we have advance warning that something besides information is at work in our concerns with personal privacy.

Finally we come to the last, and least plausible, part of Parent's model. As with most aspects of this analysis, there is complete candor and philosophical purpose to its inclusion.

My definition of privacy excludes knowledge of documented personal information. I do this for a simple reason. Suppose that A is browsing through some old newspapers and happens to see B's name in a story about child prodigies who unaccountably failed to succeed as adults. Should we accuse A of invading B's privacy? No. An affirmative answer blurs the distinction between the public and the private. What belongs to the public domain cannot without glaring paradox be called private; consequently it should not be incorporated within our concept of privacy.¹¹

I confess here to a simple intuitive disagreement. I believe that the adolescent games engaged in by Bill and Monica were none of our business. I think that their inclusion in the Special Prosecutor's report was a violation of privacy. Grant me the above, as they say, for the sake of argument. Doesn't it continue to violate their privacy every time their behavior is referred to again in the tabloids, or the evening news, or in monologues on late-night TV? Parent's category of undocumented personal information seems to put a kind of statute of limitations on violations of privacy. I surreptitiously take a digital photo of you and your mistress. I take it that we are agreed I have violated your privacy. I post it on my webpage, I have further violated your privacy. Is the picture now fair game? Is it permissible, now, for others to forward it indiscriminately. Maybe my

webpage is obscure and rarely accessed, but Smith's is prestigious and everybody clicks in. Doesn't Smith further violate your privacy, perhaps even more seriously than I did, when she uploads the photo onto hers? The issues raised here are more subtle than the simple dismissal that "what belongs to the public domain cannot without glaring paradox be called private."

Most introductory logic books contain ordinary language paraphrases for the sentential connectives in the first-order propositional calculus. The relationship of biconditionality that we typically see in the classical form of conceptual analysis is indicated in colloquial speech by the phrases "if and only if," or "just in case." I know of no intro book that includes the phrase "exactly to the degree that." I am assuming, nevertheless, that Parent intends this strong logical connection. His model of personal privacy, then, can be reconstructed as follows.

A's privacy is violated by B iff:

- B possesses personal knowledge (or information) about A (without A's consent).
- The personal knowledge about A is undocumented.

This model possesses many conceptual virtues - relative clarity, simplicity, and perhaps even initial plausibility. Its biggest vice, unfortunately, that it seriously mischaracterizes the nature and importance of personal privacy. I will use the method of counter-examples to make my case.

B. Three Kinds of Counter-Examples

I will be presenting three distinct sorts of counter-examples to Parent's model of personal privacy. Any one of these would be adequate for the narrow task of demonstrating the model's inadequacy, of course, but it is interesting to see the different ways it fails to capture some of our deepest feelings about privacy. My ultimate goal is to suggest that these categories of counter-examples pose profound explanatory hurdles for any type of information based analysis of privacy. And may even prove useful in pointing the way to more plausible accounts of the concept.

The first class of cases involve failed attempts to uncover information, including undocumented personal information. You and I are both candidates for the department chair. You suspect that I engage in unprofessional conduct with female students in the privacy of my office, and that by documenting it to the Dean you can sabotage my candidacy. You bribe the custodian, gain access to my office late one night, and install hidden microphones and video cameras. Bad luck for you. In the two weeks you monitor my office I contract the flu, and never make it into work. The job is announced, neither of us gets it, and you remove the equipment before I recover and return to school. According to Parent's model, you do not violate my privacy by your actions. After all, you clearly do not possess undocumented personal information about me. You do know that I haven't been into work, but that information is not personal, and is well-documented with all of our colleagues. You possess data about how messy my office is, but again, that's not particularly personal, and is so well-documented within the campus community that I am famous for my untidy

ways. Have you perhaps simply attempted to violate my privacy, but failed? Your devious plan is certainly a spectacular failure, but you have succeeded, beautifully, in violating my privacy. It would be way too easy on you to allow you to plead to the lesser moral charge of merely attempting to violate my privacy. I know of no way of establishing this clear intuition on my part other than asking you to imagine yourself as the victim. Isn't your outrage, supposing that you somehow find out about the surveillance, that of someone who has actually been harmed, not that of someone who has luckily avoided it?

The second class of counter-examples seeks to even more drastically sever the connection between privacy and information. You are my research assistant. I believe that you have great academic promise, and I also presume to know you well enough to make judgments about your future happiness. You tell me of your plans to delay your dissertation and get married. I'm convinced the guy's a loser, and that you will be terribly unhappy; I'm also devastated that you would potentially abandon such bright academic prospects. Though many might disagree, I do not believe that it would be a violation of your privacy for me to share my misgivings with you as a friend and mentor. But suppose I just can't let go of it. I continually lecture you on what a mistake you are about to make, how you are throwing away your future, and how miserable you will be. Surely, now, I have intruded on things that are "none of my business."

I am convinced that this is a very central case of violating someone's privacy. Focus on knowledge or information, however, seems to completely miss the normative point. It is true, of course, that you could have protected yourself

from my meddling by keeping your plans secret. There is what we might call an empirical link between personal privacy and blocks on information and knowledge in many cases like the above. If you hide your plans from me, keep them secret, treat them as confidential, you will no doubt spare yourself from my butting in. But the violation of your privacy is not what I know, or data that I have come to possess. It is what I do. I violate your privacy by being a presumptuous busybody.

The last class of counter-examples explores the delicate topics of sexuality and nudity. More than one privacy scholar has commented on the archaic sounding expression "private parts" as a euphuism for genitals. Our bodies, particularly in states of undress, as well as our sex lives, are preeminent areas of personal privacy. Yet, information models totally miss the point of the privacy concerns associated with sexuality, excretion, and nudity. Consider two nice examples from the recent literature. First from Julie Inness.

[W]hen a peeping Tom looks in a person's window for the *second* time, it is conceivable that he might acquire absolutely no new information about the victim. Despite this failure, the peeping Tom clearly violates the victim's privacy with the second, as well as the first, inspection. When he is charged with the second violation, he cannot escape with the explanation, "I've seen it all before!"¹²

And a second from Judith DeCew.

Consider a man who knows his wife's body very well but is now divorced from her and spying on her as she takes a bath. It is difficult to deny that her privacy is being invaded.¹³

The power of these little counter-examples seems to derive from the fact that “knowledge” of the appearance of the victim’s body is in some sense “documented.” And since Parent’s analysis explicitly includes the condition that the “information” be undocumented, they constitute profound, and I would argue, fatal, problems for the model. I would go further, however. What about Inness’s voyeur on his first visit to his victim’s window? Surely he has violated her privacy. Has he gained undocumented personal information? Perhaps, but I suggest that any information or knowledge is completely incidental to the offense, and that it totally misrepresents the victim’s concern. She cares that the privacy of her home has been compromised, and that she has been stared at in a state of undress, and not that something secret or confidential has been discovered. Thus, I am pressing the point that cases of voyeurism count as serious counter-examples to Parent’s analysis quite independently of the number of times one has been victimized.

C. More Modest Information Models of Privacy

An attack on a very specific conceptual model can be a cowardly strategy. So what if the precise formulation suggested by Parent can be shown to be inadequate? The philosophical critic earns some small analytical points by systematically marshaling her counter examples, but does this in anyway show that the initial intuition is conceptually flawed? Many scholars, perhaps even a majority of them, have seen something analytically central between the concepts of information and privacy. The more interesting analyses attempt to articulate

this connection in more modest and plausible forms. Consider, for example, the following from Richard Wasserstrom.

It is apparent that there are a number of different claims that can be made in the name of privacy. A number - and perhaps all - of them involve the question of the kind and degree of control that a person ought to be able to exercise in respect to knowledge or the disclosure of information about himself or herself. That is not all there is to privacy, but it is surely one central theme.¹⁴

Is information even analytically central to the concept of privacy? If the literature is to be trusted, the consensus must be an unqualified yes. And to the degree that the intuitions of casual speakers are relevant, the answer is again in the affirmative. Perhaps, therefore, it is nothing more than an exercise in semantic legislation to quarrel with such widespread agreement. Still, I see no escape from the fact that the analysis so far shows that there remain central cases of gross violations of privacy that have little or nothing to do with information.

This is clearest in cases like the overbearing mentor. The research assistant's decisions about marriage, her education, and perhaps her career are none of his business. His initial advice may have been appropriate, but his incessant lecturing is clearly wrong. The normative breach in these kinds of cases has nothing to do with knowledge, but with attempts to influence certain kinds of decisions and behavior. These sorts of intrusions into people's lives constitute a very serious violation of personal privacy.

Very similar considerations explain why we so naturally describe formal actions on the part of institutions and government that restrict choice as violations of privacy. When the law presumes to restrict the use of contraceptive devices it intrudes on individuals' privacy.

If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.¹⁵

We have already seen that information is related to these sorts of privacy violations in a contingent manner. If the research assistant keeps her plans secret, she effectively blocks the intrusion from her mentor. If single and married individuals only clandestinely obtain and use birth control devices, they have little to fear from government. But even this concedes too much to information analyses. Why should the graduate student have to keep her plans secret? Indeed, she wanted to share the exciting news with her mentor. The Connecticut and Massachusetts laws in *Griswold* and *Eisenstadt* make this point even more directly. Why should married or single individuals have to take any risk of being caught, or suffer the inconvenience of the black market to secure their contraceptives? Government has no business in this aspect of a person's life.

I have already argued that the very complex, and clearly socially constructed, conventions regarding sexuality, nudity, and the like cannot be adequately captured by the concepts of information and knowledge. Any temptation to treat these issues in informational terms simply places an

unrealistic emphasis on the sensory nature of the violation. It is true that sensory modalities are our primary, if not only, means of acquiring information. It is equally true that the voyeur, or the pervert who listens in as you and your lover engage in sex, depends upon his senses for his cheap thrills. But the goal of the watching or listening is not informational, and the offense felt by the victims has nothing to do with any potential knowledge that might be illegitimately gained.

The force of these examples is very different than when they were first applied to Parent. The modest approach is not committed to information being logically necessary, nor sufficient, for the concept privacy. The counter examples, therefore, do not refute the model. They do pose, however, what I have called explanatory hurdles. Information is hypothesized as a central, indeed the central, analytic component in privacy. Yet there are at least two sorts of standard privacy violations that have little, if anything, to do with knowledge or information. This has to give at least some pause for thought.

C. Information and the Judgment of Others

Perhaps the virtues of information models can only truly be appreciated by focusing on the admittedly numerous cases where privacy and the control of personal information does seem center stage. Let us turn our attention to some instances of privacy that seem to intrinsically involve epistemological concepts of knowledge and information. Most of us in this culture consider facts and data about the following aspects of our lives very personal and private.

- Our health and medical records

- Our finances
- Lifestyle choices such as our use of drugs and alcohol
- Details about our closest personal relationships
- Almost any occurrences within the “privacy” of our homes
- Creative endeavors like poetry or painting

We may, of course, voluntarily chose to share this personal information with others - the finance company when we apply for a loan, guests invited into our homes, or our paintings when they are displayed at the county fair. But the choice is ours; we are entitled to block others from having this knowledge about us, and to feel profound moral and legal outrage when they illegitimately come to possess it.

It is indeed natural to describe the privacy concerns above in informational terms. I have been arguing for two decades, however, that information and knowledge is not our “real” concern.¹⁶ To take a couple of examples from the little laundry list above - I desire to shelter information about my drinking, lest you consider me a drunk; my poetry is confidential, since I have no desire to be laughed at. My general thesis has been that there is an obvious empirical connection between information and judgment. On the basis of personal information (both reliable and unreliable) others may form judgments about us. Perhaps the most effective way of ensuring that others not illegitimately judge us is to block their access to personal information. Thus, I claim, in a world where individuals were truly granted a limited and culturally defined immunity from the judgment of others, we would have little, if any,

concern about others possessing information about us within this limited sphere of our lives.

The immunity from the judgment of others hypothesis nicely captures our privacy concerns with respect to government. The Fourth Amendment grants us immunity from the judgment of the state with respect to our persons, houses, papers, and effects. Rather than warrants and probable cause providing shields that allow for criminal activity, the Fourth Amendment protects the innocent, honorable, and law-abiding. We are all granted immunity from government's moral and legal judgment within these most private aspects of our personal environment. In addition, we are granted immunity from judgment with respect to certain personal decisions and actions. It was none of the overbearing mentor's business what his research assistant decided to do with her life. Recent constitutional law has similarly recognized that it is none of government's business what citizens decide to do with respect to birth control, unwanted pregnancies, or consensual adult sexual encounters. Many of us believe, though the Supreme Court has yet to agree, that it is none of government's business what the gender of citizens desiring to marry is, or choices to end one's life in the face of medical considerations. Here it is very clear, I believe, that our privacy concerns are not with government having knowledge that we have secured an abortion, are seeking homosexual marriage, or exercised our right to die, but that we insist that government not judge us, that it not criminalize or prohibit these personal choices and behavior.

The judgment of others hypothesis has the advantage of changing the focus from the passive epistemological states of others, to the much more active affective cognitive states of others. Most of us immediately recognize how discomfoting it can be to be judged by others in those limited contexts where we expect immunity. I remain confident, therefore, that the immunity from the judgment of others account is explanatorily superior to information models in many contexts. I think it does a much better job of uncovering the source of our own reactions to violations of our privacy.

Unfortunately, many of the examples I have brought to bear against information models apply with almost equal force to the immunity from the judgment of others approach. There is nothing intrinsically judgmental about voyeurism, for example. And, in fact, much of what we might call casual snooping can be done from a non-judgmental perspective - maybe I'm just curious about how much money you make. The move to the affective attitudes of others, rather than the passive state of their knowledge, remains a useful insight into the analytic core of personal privacy. But when all is said and done, immunity from the judgment of others only captures a part of the concept of privacy, and it seems worthwhile to continue the quest for a more all-inclusive analysis.

IV. Cluster Theories of Privacy

The right to privacy is another example. We value privacy; and what we think of as the right to privacy is a cluster of rights that protect it. But here it seems to me there is much slithering in the literature: not

only is the scope of this right unclear, it is unclear what is even at the heart of it.

But there are no sharp boundaries around any of the cluster-rights, even those much clearer than is that of the right to privacy.¹⁷

A. The Diversity of Privacy

The concept of personal privacy encompasses a daunting array of cases.

Most of us expect some protection from the following sorts of invasions.

- Having our offices or homes monitored .
- The spying of peeping-Toms
- Having our medical or financial records perused by others.
- Having personal information published in the tabloids.
- Having well-meaning, but overbearing, mentors lecture us on career or marriage.
- Unreasonable searches by the police.
- “[U]nwarranted governmental intrusion into matters so fundamentally affecting a person as the right to bear or beget a child.”¹⁸

Much of the privacy literature assumes some core notion that unites this wide collection of moral, legal, and constitutional concerns. But, perhaps, we are not dealing with a single concept, or right, at all, but a complex amalgamation of legal and moral immunities misleadingly assembled under a single rubric.

This hypothesis has two immediate theoretical advantages. It offers a very straightforward account of the past one hundred years of privacy scholarship. No wonder the literature is in such disarray. It would be like trying to offer a definition of the concept of a bank that simultaneously included financial institutions, sides of rivers, and elevated turns in the roadway.

Furthermore, if the philosopher or academic lawyer is freed from the responsibility of offering all-inclusive analyses, perhaps genuine headway can be made concerning concrete issues like, the confidentiality of medical records, or a better understanding of the Fourth Amendment's requirement that searches be reasonable. Although the case for abandoning the search for a unified analysis of personal privacy is potentially strong, the traditional goal of articulating an all-encompassing model of such an important moral and legal notion also seems worth pursuing. We must, therefore, briefly examine a couple of recent arguments for abandoning the traditional approach.

B. Thomson's Derivative Theory

According to Judith Jarvis Thomson the only clarity in the privacy literature is its unclarity.

Perhaps the most striking thing about the right to privacy is that nobody seems to have a very clear idea what it is.¹⁹

She then goes on to offer a very concrete diagnosis of why there has been such widespread confusion. Indeed, she suggests three related sources of our analytical befuddlement. First is our fragile understanding of the concept of privacy. Second, and equally important, are the pervasive misunderstandings concerning rights, in general. And, third, the hypothesis that we are not really dealing with a univocal concept at all when we worry about the right to privacy.

It begins to suggest itself, then, as a simplifying hypothesis, that the right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with the cluster of rights which

the right over the person consists in and also with the cluster of rights which owning property consists in.²⁰

Professor Thomson is well-known among professional philosophers for the grace of her prose, and particularly, for her inspired use of thought-experiments as rhetorical devices for arguing a conceptual case. She begins with a good one. She and her husband are having a fight that is very loud and they have carelessly left the windows open. I stop to listen. This is not very nice of me, perhaps it is even morally wrong, but I do not violate their rights. In contrast she asks us to consider a slightly different scenario. She and her husband are again fighting, but much quieter, and with the windows closed. You listen to them by training an amplifier on the house. You have violated their right to privacy. Thomson sees the normative difference between these cases as a conceptual datum, a starting point for discussion. I'm not completely convinced, but let's grant her point. By her own account we are not really discussing the nature of personal privacy, but what is involved in having a (moral) right - in this case the right to privacy. These are very different issues. Thomson implicitly concedes that both examples potentially concern privacy, why else explicitly contrast them? She further concedes that normative conventions cover both cases. Suppose she is right that I do not violate anyone's rights by listening to the louder fight. I can't be arrested or sued, for example. I still may intrude on her and husband's privacy. Indeed, I will be arguing that is precisely why what I have done is not very nice, and probably wrong.

Her account of why the second case of listening to the fight is a violation of the right to privacy, and the first case is at worst an intrusion upon privacy, depends on an analogy with personal property - in her delightful example, a particularly great pornographic picture. As with anything you own, you have certain concrete rights that derive from the general right to property. Thus, you have a right that your pornographic picture not be taken from you, damaged, or even looked at by others without your permission - though if your "picture is good pornography, it would be pretty mingy of [you] to keep it permanently hidden so that nobody but [you] shall ever see it - a nicer person would let his friends have a look too."²¹ If I tear your picture up, I violate an "ungrand" right of yours not to have your pornographic pictures destroyed; one that derives from your right to property. If I train my long distance X-ray device on your wall safe where you keep the picture squirreled away, I violate your "ungrand" right not to have your porn looked at by others. We describe this latter case as deriving from your right to privacy, but Thomson claims its source is really the right to property.

Thomson argues that we also possess a general right "over our own person." Your specific rights over your left knee, to again poach one of her examples, is not exactly a property right - you didn't buy it, though you could sell it except for the problem of, "who'd buy a used left knee?"²² This "grand" right leads to several specific "ungrand" rights - the right not to have your left knee damaged, or stroked, or if you're shy, even looked at. When it comes to immunity from having your knee damaged, this ungrand right derives from your

right over your own person. According to Thomson, in the case of the knee being looked at, and perhaps simply touched, as well, we are tempted to derive the protection from the right to privacy, but it just as likely comes from this general right over our own person.

Now rights to both property, and over one's person, are not inalienable; they can be waived, sold, given away, or carelessly non-enforced. You do not violate my right to property if you take home the pornographic photograph that I carelessly left on the bus, neither do you violate my right to property (and perhaps privacy) if you simply look at it there on the bus seat. Similarly with the left knee, if you carelessly leave it exposed for all the world to see, we violate no right of yours - neither over your person, nor a right of privacy - if we all take a good look. This is the crux of her argument about listening to the fight between her and her husband. By leaving the window open and screaming at the top of their lungs, they have carelessly given away, or at least not take proper steps to protect their right to privacy.

All of this is merely sets the stage for the derivative thesis. Thomson correctly sees that merely re-describing situations involving the right to privacy in language that doesn't use the concept, or even in terms of differing normative entitlements, does not establish the thesis that there is no distinct right to privacy.

The fact, supposing it is a fact, that every right in the right-to-privacy cluster is also in some other rights cluster does not by itself show that the right to privacy is in any plausible sense a "derivative" right. A more important point seems to me to be this: the

fact that we have a right to privacy does not explain our having any of the rights in the right to privacy cluster. . . . I have a right that my pornographic picture not be torn. Why? Because it's mine, because I own it. . . . But I don't have a right not to be looked at because I have a right to privacy; I don't have a right that no one shall torture me in order to get personal information about me because I have a right to privacy; one is inclined, rather, to say that it is because I have *these* rights that I have a right to privacy.²³

There are a number of rights that I possess that I would have naively taken to be explained by a more general right to privacy. These include, at least, the following.

- I have a right not to be looked at (in certain culturally defined contexts).
- I have a right not to have personal information about me published.
- I have a right not to be unreasonably searched.
- I have a right not to have fundamentally important decisions interfered with.

Why? According to the derivative hypothesis this is not because of any general right to privacy - that's an illusion. Rather, if a right to privacy exists at all, it is because of these, and other equally specific, rights.

Couldn't an argument of the same form be constructed for any general right? Consider some specific property rights.

- I have a right that my car not be "borrowed" without my permission.
- I have a right that my articles on privacy not be copied.

- I have a right that my acreage in the woods not be trespassed upon.
- I have a right to will my patent on my invention to my nephew.
- I have a right to sell my used left knee.

Suppose a derivative theorist of property were to claim that no general right to property explains the specific rights, but rather it is the specific rights that give us the general right to property. In one sense, this is exactly right. General concepts in the law usually come from specific cases. But, it also seems genuinely explanatory to account for these specific rights in terms of a general right to property.

This is exactly the response I want to give to the derivative account of the right to privacy. In one helpful sense, the general right to privacy does derive from specific cases. But that does not mean that it is unhelpful, or non-explanatory, to account for those very same specific cases by appealing to a general right to privacy. Particularly, if some unified theory of the abstract nature of privacy is forthcoming. The fallacy here is to assume that conceptual explanation can only work in one direction. Such a view of explanation is plausible in the case of causal accounts, but much less plausible in moral philosophy or jurisprudence.

Thomson's argument, after all, is not about privacy, but about the right to privacy. It is easy enough, however, to imagine what a derivative theory of the nature of privacy would look like. No one has a clear idea of what privacy is. The only thing that unites different examples of privacy is that we use the term,

"privacy," to describe them. This, of course, is possible, but I think extremely implausible. Privacy scholars have found it extremely difficult to articulate a simple elegant theory of the nature of privacy - that's almost a truism. But, it hardly follows that there is *nothing* other than our use of the concept that unifies the varied privacy concerns. I remain optimistic that there is, indeed, something that brings together the different moral, legal, and constitutional concerns that we use the language of privacy to characterize.

C. DeCew's Multifaceted Model of Privacy

Judith DeCew's very interesting and useful analysis of privacy candidly attempts to split the difference between the derivative approach championed by Thomson, and the narrow "unitary" approach favored by Parent. Almost everyone who has reflected on personal and legal privacy has been struck with how varied its uses are in moral and legal contexts. At the same time, we do find the use of a single concept linguistically natural. An approach to privacy that acknowledges both of these conceptual data has a lot of initial plausibility.

We have seen that it is not possible to give a unique, unitary definition of privacy that covers all the diverse privacy interests. The other extreme - abandoning the notion of privacy as meaningless or completely derivative from other interests such as property or bodily security - is equally untenable. My approach, therefore, is to take a middle course. . . . I defend privacy as a broad and multifaceted cluster concept, [and] mark out the contexts where it is natural to view privacy as crucial.²⁴

DeCew characterizes privacy as a "cluster concept," and Thomson also referred to the "privacy cluster." This notion is familiar to contemporary

philosophers, and is originally associated with the work of Wittgenstein. He claimed that not every concept could be analyzed in terms of a simple set of logically necessary and sufficient conditions that succinctly articulated the essence of the concept, and he made his point with the famous example of games.

Consider for example the proceedings that we call "games". I mean board-games, card games, ball-games, Olympic games, and so on. What is common to them all? - Don't say: "There *must* be something common, or that would not be called 'games'" - but *look and see* whether there is anything common to all. - For if you look at them you will not see something common to *all*, but similarities, relationships, and a whole series of them at that. ... [T]he result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail...

I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, color of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way. - And I shall say: 'games' form a family.²⁵

Such a view of philosophical analysis was quite popular in the 50s, 60s, and 70s, and is much less utilized in contemporary work. It is, however, commonly accepted that some concepts form a cluster or family. It is not at all unreasonable to see privacy in such a light. Much more controversial, however, is the claim that cluster concepts *have nothing* in common besides family resemblances. It remains to be seen whether privacy has a single unifying core

that can be articulated in an all encompassing analysis. As Wittgenstein correctly saw, I believe, this is a quasi-empirical matter.

Conceptual analysts have reason to be optimistic that unifying models are possible. The trick is to put into words what we see. If we recognize a family resemblance between Aunt Sarah and her nephew, what is it? Card games, board games, Olympic games, children's games, may have something in common, again, what is it? Violations of personal and legal privacy - voyeurism, snooping, appropriating one's image, searching without a warrant, denying the authority to make fundamentally important decisions - may have something in common, the challenge is to articulate this simple common feature. We may have had very limited success and this may lead to modesty and pessimism regarding future attempts. But it certainly does not follow that the task is impossible. If the cluster analysis is the best we can do, so be it. There's plenty to be learned from good family resemblance analyses. But, I want to have another go at a more unified model, one that says something about why these varied examples of privacy violations are all correctly put under the same conceptual umbrella.

V. Gavison's Access Model

Our interest in privacy is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others attention.²⁶

A. Value Neutrality and Perfect Privacy

Ruth Gavison offers perhaps the most sophisticated analysis of the concepts of personal and legal privacy in the current literature. She begins with a straightforward rejection of the derivative theory, or what she calls reductionist analyses, of the sort proposed by Thomson. Privacy is a useful notion, she argues. But how could it have such obvious utility in everyday and legal contexts, if it did not possess a coherent conceptual core? Philosophers and academic lawyers may have had a difficult time producing an adequate model, but that should not lead to abandonment of the project, only more hard analytical work.

Gavison argues that an adequate philosophical and legal analysis of privacy will need to demonstrate three distinct sorts of conceptual coherence. It will need to provide satisfying general answers to three related, but obviously different, sorts of questions.

- What is privacy? How can we identify losses of privacy when they have occurred?
- Why is privacy normatively important? Why are losses of privacy undesirable?
- Why is privacy legally important? Why should privacy enjoy legal protection?

Answers to the latter questions are logically dependent on answers to the former. Thus, we must first discover the nature of personal privacy, before we will be in a position to say anything informative about its normative importance, or its legitimate place within liberal legal theory.

Since we must carefully distinguish the purely analytical question of what privacy is, from the normative question of why it is important, Gavison insists on a strong form of value neutrality as a basic criterion for conceptual analysis. To the degree that conceptual models should have utility to disputants on both sides of great moral controversies, the insistence that we not beg any interesting moral questions is essential. A model of privacy that could only be endorsed by those holding a pro-choice position, for example, would be of little value in helping to clarify questions of privacy and abortion rights. Gavison, however, is seeking something even purer in terms of normative impartiality. She aspires to an analysis of privacy that can be stated without the use of any normative notions whatsoever. She, therefore, dismisses the idea that privacy is a right, a claim, a form of control, or a value, and insists that it must be an empirical situation.

The desire not to preempt our inquiry about the value of privacy by adopting a value-laden concept at the outset is sufficient to justify viewing privacy as a situation of an individual vis-a-vie others, or as a condition of life.²⁷

The logical nature of such an objective condition of privacy is first approached through a thought-experiment. Rather than reflecting on everyday examples of privacy, she asks her readers to imagine total, or what she calls perfect, privacy - a condition of complete isolation.

In its most suggestive sense, privacy is a limitation of others' access to an individual. As a methodological starting point, I suggest that an individual enjoys *perfect* privacy when he is completely inaccessible to others. This may be broken down into three

independent components: in perfect privacy no one has information about X , no one pays any attention to X , and no one has physical access to X .²⁸

Being stranded alone on a desert island, or locked in solitary confinement, or trapped in a spacecraft that is hurtling out of control into the void, are conditions of increased privacy, since others have no information about you, nor have physical access to you, nor pay attention to you. These examples strike us as odd because none of us want to be stranded on desert islands, locked in solitary, or hurtling into the void, but we all place great personal value on the enjoyment of our privacy. Gavison is well aware that there is something counterintuitive in all of this.

We start from the obvious fact that both perfect privacy and total loss of privacy are undesirable. Individuals must be in some intermediate state - a balance between privacy and interaction - in order to maintain human relations, develop their capacities and sensibilities, create and grow, and even to survive. Privacy thus cannot be said to be a value in the sense that the more people have of it, the better. In fact, the opposite may be true.²⁹

Something is surely amiss, here. For one thing, unless the condition of perfect privacy has been continual since birth, even complete isolation does not guarantee that one's privacy cannot be violated. A disreputable publisher could choose to print a gossipy account of your earlier life while you are stranded on the desert island. The publishers, as well as thousands of readers, could compromise your privacy by finding amusement in the article. Perhaps even more surprising, however, is that privacy is characterized as being at odds with human relationships, the growth of individual capacities and sensibilities; it even

threatens survival. It is a situation that must be balanced with social interaction. Most of the literature sees privacy in a very different light. Rather than a problem for individual growth and the establishment of important human relationships, the prevailing view is that privacy is a necessary condition for their establishment and maintenance.³⁰

B. Coherence and Independence

Although, “[p]rivacy is a term with many meanings,”³¹ Gavison is committed to finding a coherent conceptual core. This core can be expressed “suggestively” as “a limitation of others’ access to an individual.”³² But as we will see directly, in many privacy violations, the idea of limited access is at best a metaphor. To discover the non-metaphorical nature of privacy it is necessary to consider three distinct, and logically independent characteristics of privacy. Thus, Gavison proposes a cluster analysis of privacy, though she never uses the Wittgensteinian notion. Privacy is a concept with an identifiable “family resemblance” that gives it conceptual coherence, but with characteristics that are logically independent in the sense that none are individually logically necessary, nor sufficient.

The concept of privacy suggested here is a complex of these three independent and irreducible elements: secrecy, anonymity, and solitude. Each is independent in the sense that a loss of privacy may occur through a change in any one of the three, without a necessary loss in either of the other two. The concept is nevertheless coherent because the three are all part of the same notion of accessibility, and are related in many important ways.³³

I have already conceded that a well-executed cluster analysis can be of great philosophical value. It may seem caviling, therefore, to quarrel with Gavison's model, particularly since I believe that it contains most of what we need to know about personal and legal privacy. My worries are twofold. I am unconvinced that any of the elements above—secrecy, anonymity, or solitude—are essential components of personal privacy. They are useful devices for the protection of privacy, but not analytically central. Secondly, I believe that the entire analytic strategy got off on the wrong foot by a serious misrepresentation of the needs and standards for normative neutrality within conceptual models. Nevertheless, I remain optimistic that by teasing apart the very useful collection of insights within the accessibility to others model, we may yet discover a single non-metaphorical characteristic that unites the central cases of privacy violation.

C. Gavison's Three Characteristics of Privacy

Characteristic One—Information known about an individual. One way that others can gain access to us is through information they have about us. Obviously, we are dealing with an extended, or metaphorical, sense of gaining access. If Madonna is vacationing in Australia, and my access to her is a cheesy tabloid article I am reading about her here in the Pacific Northwest, then the sort of epistemological access in Gavison's first characteristic of privacy has nothing to do with physical space. Still, the metaphor has resonance, I have gained access to her life in ways that potentially implicate her privacy.

Gavison noted, in 1980, "the most lively privacy issue now discussed is related to information-gathering."³⁴ The observation is even more applicable in

our post-9/11 world. Any adequate account of personal privacy will have to naturally accommodate the centrality of our normative concerns with the control of personal information. Gavison's model does this nicely by addressing information twice over - once through the metaphor of access by others, and then again, literally, as an independent and irreducible element.

Perhaps the greatest strength of Gavison's appeal to information as conceptually central to privacy is that the standard gambit of attacking by counter-example is effectively blocked. Information and knowledge is merely one method of gaining access to another. It, therefore, counts for very little that we can enumerate clear cases of privacy violations that have little or nothing to do with knowledge possessed by others. It would, of course, count against the model if most of our worries about personal privacy had nothing to do with information, but as we have seen, many of them clearly do. It may seem, therefore, that the inclusion of information as conceptually relevant to privacy, but neither logically necessary nor sufficient, is just what the doctor ordered.

I stand by my earlier critique of information models, but I concede the challenge posed by Gavison's strategy. I must now restrict my argument almost entirely to an appeal to my readers' intuitions about violations of their own privacy. Suppose, for example, that you were the unfortunate victim in the following situation.

If secrecy is not treated as an independent element of privacy, then the following [is] only [one] of the situations that will not be considered [a] loss of privacy: ... an estranged wife who publishes her husband's love letters to her, without his consent.³⁵

I take it we all agree that you have a normative complaint here, at least in part because your privacy has been violated. Setting aside other moral concerns like the clear breaking of trust, what is so distressing about the love letters being made public? We can imagine circumstances, of course, where some crucial confidential fact is disclosed, but in most cases our worries have nothing to do with personal information. You might even desire that others know that you are capable of composing mushy proclamations of your undying affection, since this shows that you have a romantic side to your personality. But you would still consider the letters private. Gavison addresses the publication of the love letters as an instance of “information known about an individual,” but I would say that the case more appropriately turns on the attention of others. As the readers amuse themselves with your intimate bearing of your soul, you feel violated because they are focusing their attention on you, and a part of your life that our culture recognizes as private. As I have said numerous times in this discussion, any facts or knowledge gained by the reader are incidental, and quite beside the normative point. And all of this is perfectly compatible with the observation that keeping the love letters secret will quite effectively spare you the distress.

Characteristic Two—Physical access to an individual. There is, of course, an obviously non-metaphorical way in which others can gain access to us. They can put themselves in “physical proximity,” to us where they are “close enough to touch or observe [us] through normal use of [their] senses.”³⁶ Gavison argues that the fact “that our spatial aloneness has diminished” is cause

for a potential privacy complaint. If we accept the value-neutral notion of “perfect” privacy, then the mere fact of physical access on the part of others automatically counts as a diminishment of privacy. Whether or not this is the case, the suggestion that spatial aloneness constitutes a part of the analytic core of personal privacy is an intriguing, controversial, but I will argue, an ultimately mistaken, hypothesis.

Gavison claims that a diverse list of privacy violations can be most clearly appreciated in terms of illegitimate physical access to an individual.

The following situations involving loss of privacy can best be understood in terms of physical access: (a) a stranger who gains entrance to a woman’s home on false pretenses in order to watch her giving birth; (b) Peeping Toms; (c) a stranger who sits on “our” bench, even though the park is full of empty benches; and (d) a move from a single-person office to a much larger one that must be shared with a colleague. In each of these cases, the essence of the complaint is not that more information about us has been acquired, nor more attention has been drawn to us, but that our spatial aloneness has been diminished.³⁷

I fully agree with the observation that the acquisition of personal information has nothing to do with the essential nature of the privacy loss in any of these examples. I am far from convinced, however, that the diminishment of spatial aloneness takes us very far, either.

Take the case of the Peeping Tom. Do victims truly feel violated because others had gained close physical access to them? I very much doubt that this is the case. It is of course possible, that in certain very specific contexts spatial considerations exacerbate the feeling of unease. But, in general, doesn’t the

offense have more to do with the thoughts and attitudes of the voyeur, and not his spatial location? By Gavison's own criteria of close "physical proximity," the voyeur who peeks through the window via a telescope does not diminish spatial aloneness.

The ability to watch and listen, however, is not in itself an indication of physical access, because *Y* can watch *X* from a distance or wiretap *X*'s telephone. This explains why it is much easier for *X* to know that *Y* has physical access to him than when *Y* observes him.³⁸

This has very puzzling consequences. The victim of the Peeping Tom who has her privacy compromised by having her window peeked through has had her spatial aloneness compromised. But the victim who is spied upon from up the hill via a very powerful telescope does not suffer this same loss of solitude. But the latter victim's privacy has clearly been violated. The only one of Gavison's characteristics that potentially covers her complaint is that she has illegitimately become the object of the voyeur's attention. But, isn't this really a better account of the first victim's moral outrage, as well?

Characteristic Three—Attention paid to an individual. The characteristic of privacy that I will argue is the most important component in Gavison's analysis receives slight attention within the discussion. She introduces the affective notion of attention from others in a very suggestive passage.

An individual always loses privacy when he becomes the subject of attention. This will be true whether the attention is conscious and purposeful, or inadvertent. Attention is a primary way of acquiring information, and is sometimes essential to such acquisition, but

attention alone will cause a loss of privacy even if no new information becomes known.³⁹

Professor Gavison is very careful to qualify the connection between attention and the acquisition of personal information with the language of “primary way,” and “sometimes.” It is not that much of a stretch, however, to wonder if there is not some stronger connection between the concepts. Perhaps knowing certain sorts of information about an individual always constitutes a form of paying attention to that person. Don’t I pay attention to Madonna when I read the sleazy article? Although the discussion is getting ahead of itself, I am raising the question of whether the notion of the attention of others is really independent from the notion knowledge about others.

The strategy that is emerging is to call into question Gavison’s claim that her privacy characteristics are logically independent and irreducible. We have seen in the case of the love letters that what she takes to be a central case of a privacy violation in terms of information known about another can not only be reduced to a case of attention paid to an individual, but in fact, more plausibly be so characterized. In a similar vain, the case of the Peeping Tom, reduced with greater normative insight from an instance of physical access to an individual to one of attention being illegitimately paid. To make good on the stronger hypothesis to be offered in the next section, I will need to convince my readers that all cases, of informational violations of privacy, and not just a few convenient ones, can be reduced to illegitimate attention being paid to an individual. And also, that all instances of loss of privacy resulting from physical

access to an individual can plausibly be re-characterized as cases in terms of illegitimate attention by others.

VI. Immunity from the Focused Attention of Others

Private” used in this . . . immunity-claiming way is both norm-dependent and norm-invoking. It is norm dependent because *private affairs* and *private rooms* cannot be identified without some reference to norms. So any definition of the concept of “private affairs” must presuppose the existence of *some* norms restricting unlicensed observation, reporting, or entry, even though no norm in particular is necessary to the concept. It is norm-invoking in that one need say no more than “This is a private matter” to claim that anyone not invited to concern himself with it ought to stay out of it.⁴⁰

A. Norm-dependent Concepts

To leave all reference to values out of a conceptual model of a normative notion can result, not in normative neutrality, but an impoverished conceptual picture. Stanley Benn gets it exactly right above when he observes that the concept of privacy allows us to claim a certain kind of norm-dependent immunity from others. The exact nature of this immunity is, of course, still a matter dispute. We have seen that many scholars have seen it as an immunity from the knowledge of others. Other theorists have articulated the prerogative as an immunity from the judgment of others. And, although she eschews anything that is not strictly value-neutral, Ruth Gavison’s model treats personal privacy as an immunity from the access of others.

The implicit appeal to preexisting norms becomes clear when we see that, at least in the case of immunity from knowledge, or immunity from judgment, no

serious scholar has suggested any thing like a blanket immunity. Obviously we possess all sorts personal information, and know quite a bit, about others without violating their privacy. And we clearly form all sorts of judgments about others, both positive and negative, without compromising their privacy. Thus, if privacy consists of an immunity from knowledge or judgment, it is only within certain very specific and largely culturally defined areas of a person's life. We can make this disguised appeal to existing norms explicit by recognizing that an implicit decision as to what is legitimate and illegitimate underlies appropriate uses of the concept of privacy. All of this suggests a pattern for theoretical models of privacy. Rather than defining privacy in terms of some general immunity, **X**, it will be more perspicuous to characterize it as an immunity from **illegitimate** instances of **X**.

Ruth Gavison was insistent that her conceptual definition eschew any use of value-laden components. Her mistake, I would argue, was not her admirable desire for a non-question-begging model, but in ignoring the value-dependence of the concept she was analyzing. Her central insights become much more plausible when privacy is recast as an immunity from the illegitimate access of others. The three characteristics she identifies as independent aspects of personal privacy also gain increased plausibility when they are articulated as limited areas of immunity - thus, immunity from illegitimate information being known by others, immunity from the illegitimate attention of others, and immunity from illegitimate physical access by others. Such a reformulation of the access model completely does away with the need for the artificial, and I

think misleading, notion of perfect privacy. But at the same time, it allows us to see how complete physical inaccessibility would contingently guarantee that there was no form of illegitimate access on the part of others.

B. No One's Business

James Rachels suggests that we would be well-advised to more seriously investigate the colloquial expression, "none of your business," for conceptual clues regarding personal privacy.

A woman may rightfully be upset if her credit-rating is adversely affected by a report about her sexual behavior because the use of such information is unfair; however, she may also object to the report simply because she feels - as most of us do - that her sex life is *nobody else's business*. This, I think, is an extremely important point. We have a "sense of privacy" which is violated in such affairs, and this sense of privacy cannot adequately be explained merely in terms of our fear of being embarrassed or disadvantaged in one of these obvious ways. An adequate account of privacy should help us understand what makes something "someone's business" and why intrusions into things that are "none of your business" are, as such, offensive.⁴¹

I would argue that the "none of your business" test does at least as good a job of delineating the bounds of personal privacy as any of the sophisticated analyses considered so far.

Judith DeCew demurred the possibility of producing a unitary model of privacy, but I think she has actually managed to articulate one of the most promising candidates in the literature - one that fits quite nicely with the none of your business insight.

I [have] developed a proposal that takes the realm of the private to be whatever is not, according to a reasonable person in normal circumstances, the legitimate concern of others. Clearly, the proposal as it stands is vague and overbroad.⁴²

One philosopher's vagueness and over-breadth, it appears, is another's helpful insight. Reflection on psychological activity that colloquial speech characterizes as concerning ourselves with another holds great promise as analytical device for probing the contours of personal privacy.

What is it to concern ourselves with another? What is it for others to make our business theirs? A cinemagraphic metaphor is helpful here. There is a kind of zooming in, or tightening of cognitive and emotional focus. The cocktail party is crowded and noisy; I hear random bits of several scattered conversations. All of the sudden I am struck with your animated exchange with your lover. I move in and actively listen to what you're discussing. I have concerned myself with your particular conversation; I've made it my business. And, of course, in the context imagined, I have done all of this quite illegitimately.

C. The Focused Attention of Others

Information models of privacy postulate what I have called an epistemological relationship between the individual enjoying the immunity afforded by privacy conventions and others who would potentially violate that immunity. For Gavison the relationship is a spatial one, with concepts of distance, and spatial and sensory barriers, lurking in the background. One of the advantages I would still claim for the judgment of others model is that it recast

the privacy relationship in much more candidly affective terms. Individuals were seen as enjoying immunity from certain kinds of conscious thoughts and attitudes on the part of others. It turned out, of course, that the notion of judgment was too narrow to capture all of the illegitimate thoughts and attitudes through which others might violate another's privacy.

With a candid acknowledgment that the original inspiration came from Gavison's characteristic of attention of others, I would like to propose the following as the single conceptual core of personal privacy.⁴³ ***Privacy demarcates those areas of people's lives where they are granted - both by cultural norms and legal traditions - limited immunity from the focused attention of others.*** I put this forward not in the classical tradition of a single necessary and sufficient condition, but as an explanatory hypothesis. Immunity from the illegitimate focused attention of others as a rubric for personal privacy provides, I claim, the simplest, most complete, non-*ad hoc*, account; it is for these reasons the most plausible model.

As anyone who has ever put forward an interpretive theory knows, it is much easier to attack one's rivals, than to construct a positive defense. I can think of no other way of proceeding than reassemble the clear cases of personal privacy, and privacy violations, and then see whether the attention of others model successfully captures the central concerns.

- Others illegitimately gain access to your medical or financial records.
- Others illegitimately publish the above information.

- Others search or monitor your office, but find nothing.
- Another peeps in your window.
- Another lectures you on personal decisions you have made.
- Another [a state actor] unreasonably searches you.
- Another [the state] illegitimately interferes with an intimate and “fundamentally important” personal decision.

Illegitimate access to, and the publication of, sensitive personal records, of course, deal with the ever present concepts of personal knowledge and information. I take it that there is nothing artificial or *ad hoc* in postulating a concern with the illegitimate focused attention of others as underlying our privacy concerns in connection to the forbidden acquisition and dissemination of personal information. The failed office monitoring reminds us, again, that mere attempts to acquire information involve an active focusing of attention by others; from which we may be granted some limited immunity. Voyeurism shows how our privacy can be compromised via the standard sensory means by which we gather much of our knowledge and yet have little to do with the gathering of information - our culture and legal system protects us from these non-informational instances of focused attention by others, nevertheless. A general, though at the same time very limited, immunity, not just from the knowledge of others, or the physical access of others, but the attitudes of others, allows to fully appreciate instances of illegitimate judgment and meddling in another’s personal affairs such as the overbearing mentor. He focuses his attention on his research assistant - her person, her life, and her intimate decisions - in ways that

clearly violate our culture's norms. We see that these concerns can be captured by the concept of personal privacy, not just because they can plausibly be recast as areas of immunity from focused attention, but also by how naturally the expression, "none of his business," applies. The last instance from the brief inventory above that falls within the immunity from the illegitimate focused attention of others with complete ease, are instances of unreasonable state searches. In ways strongly analogous to those in which individuals can focus their attention on you to gather information, or simply to snoop, government can also focus its attention on individual citizens. The Fourth Amendment to the United States Constitution happily guarantees its citizens immunity from such attention in the form of "unreasonable" searches and seizures.

D. Fourteenth Amendment Privacy

A serious challenge for the immunity from the focused attention of others is, perhaps, presented by instances of Due Process privacy. It is matter of considerable disagreement whether the penumbras of the Bill of Rights,⁴⁴ or the Due Process Clause of the Fourteenth Amendment guarantee citizens a right to make fundamentally important personal decisions. Justice Brennan was only one of the many justices who believed that it did.

If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.⁴⁵

Other distinguished jurists, of course, have seen the matter very differently.

The Court talks about a constitutional “right of privacy” as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the “privacy” of individuals. But there is not. . . . I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.⁴⁶

Several privacy scholars have suggested that so called “decisional” privacy is at best a derivative or metaphorical notion, and at worst a simple linguistic mistake. Thus, Parent, from his perspective of semantic legislation is emphatic.

[A] person who is prohibited by law from making certain choices should be described as having been denied liberty or freedom to make them. . . . [W]e can meaningfully say that the right to liberty embraces in part the right of persons to make fundamentally important choices about their lives and therewith to exercise significant control over different aspects of their behavior. [This] is clearly distinguishable from the right of privacy which the condemns unwarranted acquisition of undocumented personal knowledge.⁴⁷

Ruth Gavison is less the semantic legislator, but argues much the same position in terms of conceptual and jurisprudential clarity.

[I]dentifying privacy as noninterference with private action, often in order to avoid an explicit return to “substantive due process,” may obscure the nature of the legal decision and draw attention away from important considerations. The limit of state interference with individual action is an important question that has been with us for centuries. The usual terminology for dealing with this question is that of “liberty of action.” It may well be that some cases pose a stronger claim for noninterference than others, and that the intimate nature of certain decisions affects these limits. This does not justify naming this set of concerns “privacy,” however. A better way to deal with these issues may be to treat

them as involving questions of liberty, in which enforcement may raise difficult privacy issues.⁽⁵²⁾

Although there is a clear difference between the sort of immunity from state attention that the Fourth Amendment affords citizens, and the immunity from state interference recognized under the Fourteenth Amendment's Due Process Clause, I think it is entirely appropriate to use the concept of privacy to describe both of them. For one thing, it is quite natural to respond to the state's concerns with contraception, abortion decisions, choices about the end of one's life, and issues of sexual intimacy, with the dismissal that it is none of their business. And, indeed, those on the other side of these substantive controversies implicitly respond in terms of personal privacy, arguing that the protection of fetal life, or the state's interest in prohibiting homosexual sodomy, are precisely the sorts of thing that democratic governments should concern themselves with. I am an unashamed partisan on these questions; I am convinced they are unquestionably none of the state's business. But I fully recognize that equally reflective people see these matters differently. In the present context, I am simply trying to locate the conceptual home for our debate, and describing it as a disagreement over the parameters of Fourteenth Amendment privacy seems linguistically true.

There are at least two ways in which government can focus its attention, and sometimes its illegitimate attention, on its citizens. The first, of course, is in ways analogous to tabloid reporters, snoops, and voyeurs. It can single you out as a person; tapping your phone, investigating your banking records, or

searching your car. The state can also focus its attention on you because you fall within a group engaged in a kind of behavior. Government focuses, for example, on speeders, passing laws restricting choices to drive beyond prescribed limits. Almost all of us concede that this is a quite legitimate instance of focused attention. We are much less comfortable, however, when the attention focuses on choices that are “fundamentally important” and intimate - such as those dealing with reproduction, pregnancy, sexuality, and death.

E. Focused Attention and Spatial Aloneness

In the course of defending her access model of privacy, Ruth Gavison included the little laundry list of instances where individuals’ privacy was clearly compromised that I have already quoted.⁴⁸ One of her examples is a potentially serious problem for the immunity from focused attention model.

The following situation[] involving loss of privacy can best be understood in terms of physical access . . . a stranger who chooses to sit on “our” bench, even though the park is full of empty benches.⁽⁵⁴⁾

The first thing that must be conceded is how natural it is to use the rubric of privacy to articulate the normative concerns raised in this example. You and I are in the park together on the bench. Perhaps we are lovers and our conversation is intimate; perhaps we are colleagues and the discussion is professional; or perhaps we are casual acquaintances and talking about last night’s ball game. When the stranger chooses “our” bench over all the empty ones we are on alert and offended. Why? If my analysis of privacy is correct, our moral complaint must concentrate on the stranger’s focused attention on us.

We suspect he has focused on us. Why else has he chosen “our” bench? We worry that he will further focus on our conversation. All of this focused attention, actual and potential, is quite illegitimate in our cultural context.

But isn’t this a little strained? Gavison claims that the mere condition of his physical access, regardless of imputed motives or other psychological states of the stranger, is enough to trigger privacy concerns. I certainly want to concede that there are complicated and mysterious conventions concerning interpersonal distance and other spatial considerations in our culture. Anyone who has spoken with people from different cultures with different “conversational distances,” or simply individuals who are insensitive to our conventions, knows that too much, and particularly too little, distance can be quite unsettling. The park example gains part of its punch, not so much from privacy conventions, but from other spatial conventions that we all recognize, even if we find them difficult to articulate.

I think we see that psychological features like focused attention are central to our privacy concerns by imagining them to be absent in the stranger scenario. Suppose that he is lonely, speaks not a word of English, and simply desires closeness. Even if we are still somewhat uncomfortable, the fact that our conversation is not the focus of his attention, certainly alleviates some of our privacy concerns. What if he’s blind and deaf, and was completely unaware that we were sitting on “his” bench? Could the stranger accidentally violate our privacy? On Gavison’s spatial access model perhaps he could. But I would argue that accidental violations of personal privacy, at least in the present

context, make no sense. And, indeed, the necessity for some kind of intent becomes an argument for the illegitimate focused attention perspective, since the psychological, and perhaps normative, intentions of privacy violators emerges as part of meaning of a privacy violation. And this is just what we should expect, given the norm dependence of the concept of privacy.

VI. Two Approaches to Rules

[I]s privacy's value best described in consequentialist or deontological terms? Case law mentions that privacy is valuable for such diverse purposes as "promotion of free discourse," "to secure conditions favorable to the pursuit of happiness," "leading lives in health and safety" in the home, "to keep secret or intimate facts about oneself from the preying eyes of ears of others," and the promotion of personal relationships. With claims such as these, the courts suggest that privacy is valuable because of its desirable consequences. Yet there is also a deontological strand in legal privacy theory. The law contains suggestions that privacy's value stems from respect for "man's spiritual nature," "individual dignity," and "inviolable personality." Since a consequentialist account of privacy's value will ultimately clash with a deontological account, we must arbitrate between them if we decide that privacy does possess an independent value.⁴⁹

The history of normative thought teaches that consequentialist justifications of moral positions must forever be at war with deontological defenses. Much of academic law seems to have bought into a similar approach to legal rules. This curious since scholars have long noticed that rules - in games, legal contexts, or basic ethical principles - can be examined from both a forward looking perspective the assesses the future consequences of new rules

and changes to existing rules, and a backward looking perspective that seeks to correct injustice and unfairness.

John Rawls illustrated this important point about rules with the classic example of legal punishment.

One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view. Thus both sides have a point (this is as it should be since intelligent and sensitive persons have been on both sides of the argument); and one's initial confusion disappears once one sees that these views apply to persons holding different offices and duties, and situated differently with respect to the system of rules that make up the criminal law.⁵⁰

Rawls' distinction between a rule administrator's perspective on rules, and a policy maker's perspective is both insightful, and misleading. The umpire has no choice but to call the batter out on the third strike, the rules clearly state what is to be done, and her job is to see to it that balls and strikes are determined, and that the rules are carried out. It makes no difference if all sorts of good consequences would follow from allowing this particular batter to have four strikes. But when the Rules Committee meets to consider changes in the rules – should the designated hitter rule be standardized?, or done away with? – potential good and bad effects of the changes dominate the discussion.

Even as much of judicial activist as Dworkin admits that most judicial work involves easy cases.⁵¹ Jurisprudential questions about what the law is get the

scholarly attention, but most of a judge's time is spent like the umpire determining balls and strikes and sending players to first base or back to the dugout based on these calls. One need not be a conservative to believe that a judge's first responsibility is to interpret and administer existing law, not to make new law. Legislators, however, are supposed to make new and better laws. It is hard to imagine how they could adequately exercise this responsibility without paying primary attention to the social, financial, and perhaps legal effects of their proposed changes and creations. Utilitarian questions like the deterrent effect of some proposed increase in punishment, or potential gains in economic efficiency resulting from common law changes in accident law, do sound a lot like the sorts of things that policy makers like the members of the rules committee, or elected legislators, should be asking themselves. Deontological questions, however, like what punishment does this convicted criminal deserve, or what is the fairest settlement of this particular law suit, sound more like the umpire making tough calls - ball or strike, fair or foul, out our safe - but working within a context where the rules are already spelled out.

This tidy compartmentalization is compromised, however, by a number of practical and legal considerations. First, of course, is the simple fact that both judges and legislators are human beings who think and act both inside and outside their institutional roles at the same time. Judges can be fully aware of what the law is, yet still be concerned with the economic, social, and legal consequences of their decisions. Indeed, we would be disappointed were they not. Similarly, a legislator's vote on a crucial bill may be every much as

dependant on his sense of what is just and fair as it is on any utilitarian calculation of the potential consequences of the proposed legislation. Rule administrators, as well as rule makers, will therefore be doomed to contemplate their actions from both the forward-looking perspective, and the backward-looking perspective, at the same time.

Most damaging of all to the Rawlsian taxonomy, however, is that the most perplexing questions about rules fall in between the stark extremes of decisions to have a rule or not, and decisions about what the rule dictates. Consider the contemporary debate about capital punishment. We have pretty clear moral rules about killing people. These moral rules have always been enshrined in criminal law. Utilitarian arguments - deterrence, public safety, the avoidance of private revenge - have always been a part of the moral and policy defense of the rules proscribing criminal homicide. Within specific jurisdictions the rules articulate maximum criminal penalties. A judge's potential sentence is bound by these existing rules. But, what happens when the debate is not about whether we should have rules against murder, but what the maximum punishment should be? Rawls is unequivocal.

The decision whether or not to use law rather than some other mechanism of social control, and the decision as to what laws to have ***and what penalties to assign***, may be settled by utilitarian arguments.⁵²

Such an emphatic assignment of the creation and change of criminal penalties to utilitarian policy making may seem surprising coming from a philosopher who would be one of the most outspoken critics of utilitarianism, but very much in

keeping with the spirit of the early 1950s where utilitarian thinking dominated criminology. In the contemporary debate about capital punishment, however, the Rawlsian assignment seems both artificial and normatively misleading. Consequentialist considerations – is the death penalty a more effect deterrent to murder than lengthy prison sentences?, what is the cost of an average execution compared to life imprisonment?, etc. – play a huge part in the debate. But it is painfully obvious that retributive arguments, along with other considerations of procedural and corrective justice, play an equally dominant role – what should be the ultimate price for first-degree murder?, is capital punishment administered in an arbitrary and capricious manner?

When all is said and done, I would argue, the safest response is to simply acknowledge that both backward-looking and forward-looking arguments have always played legitimate roles in our thinking about moral and legal rules. Our task is not some grand ontological theory about moral truth, but a better understanding of how we think – as human beings and as members of this culture – about these questions. When the issue is our privacy, our immunity from the illegitimate focused attention of others, it is obvious to me that both backward-looking and forward-looking considerations will be integral parts of a full understanding of the normative importance of privacy.

VII. Forward-Looking Justifications of Privacy

[The right to privacy] deals . . . with a cluster of immunities which, if acknowledged, curb the freedom of others to do things that are generally quite innocent if done to objects other than persons, and even to persons, if done with their permission. There

is nothing intrinsically objectionable in observing the world, including its inhabitants, and in sharing one's discoveries with anyone who finds them interesting; and this is not on account of any special claims, for instance, for scientific curiosity, or for a public interest in the discovery of truth. For I take it as a fundamental principle in morals a general liberty to do whatever one chooses unless someone else has a good reasons for interfering to prevent it . . . The onus of justification, in brief, lies on the advocate of restraint, not on the person restrained.⁵³

A. Rules, Liberty, and the Focused Attention of Others

Rules constrain free choice. The umpire must send the batter to first base after ball four, the rules say so. I must drive on the right side of the road even though the address I am looking for is more easily seen from the left. Failure to respect privacy limit may your options by focusing my illegitimate attention on you. Stanley Benn postulated a fundamental normative principle that the onus lies with proponents of rules that limit free choice, and this seems exactly right. The policy maker, or the anthropologist trying to reconstruct a functional account of social norms, is most likely to appeal to good consequences brought about by the rules, even though they limit options. We value freedom, but constrain it in certain ways because the constraints make the world better than it would otherwise be. This is the logic of the classical social contract, cutting-edge economics of law, and the solution to the prisoner's dilemma. Even when the normative considerations in favor of adopting the rules are articulated in deontological terms like justice or respect for persons, the argument still has a

forward-looking flavor to it. The world will be better in the future with the rules, than it was in the past without them.

The forward-looking calculations that would justify rules granting individuals immunity from the illegitimate focused attention of others will have to be very compelling. Focusing attention on another is not simply an idle choice like deciding to wear a Hawaiian shirt rather than a plaid one. We are all, to some degree, voyeurs and gossips. Cultures vary in their judgments about the seriousness and parameters of "observing the world, including its inhabitants, and sharing one's discoveries with anyone who finds them interesting," but all cultures recognize that people do these things. Thus, privacy rules seek to constrain a very natural human tendency that we all have to focus attention on others. If this were not challenging enough, the focused attention of others has clear good consequences for society as a whole. What others know and think about us obviously affects our behavior. It significantly improves the chances we will do the morally correct thing, the thing that the law requires. Nevertheless, most of us recognize that regardless of how natural it is to disregard privacy, and how inconvenient privacy rules may be when it comes to fighting crime or a "war" on terror; rules demarcating areas of immunity from the focused attention of others are important enough to outweigh these counter forces.

B. Pain and the Attention of Others

I assume that victims of privacy violations typically experience tangible psychological pain. Some might argue that this pain is a cultural artifact, and that there are, or at least we can imagine there might be, cultures where none of

the things we treat as private would be seen as in any way sensitive or intimate. Perhaps we can imagine societies. So what? Three things pain me as I am writing this section. A tooth is bothering me, and I fear a visit to the dentist is in order. The chronic ache in my left knee is acting up, and short of surgery, aspirin will have to do. And I'm having a big fight with my bosses about retaining a position in my department, and it's driving me crazy. The first two instances of pain are well-understood physiological occurrences that no doubt have evolutionary explanations. The last is an all too familiar example of contemporary capitalist and corporate culture, with a twist that is somewhat idiosyncratic to the academy. There is nothing intrinsically pain inducing about a resource being reallocated within an organization. I am smart enough to realize that from a purely selfish perspective, the change has almost no effect on my job. Issues of departmental prestige, and probably unfair worries about arbitrary and vindictive administrative decisions, are in no sense a natural part of a human being's biological existence. But, again, so what? If you ask me which pain I would most like to rid myself of, there's no question. The unfairness of the decision gnaws at me - it upsets my stomach, causes me to lose sleep, and just plain bums me out - while the discomfort from the tooth and knee easily recede to the background. The fact that it has a psycho-social origin, rather than a physiological one, is irrelevant from my phenomenological perspective.

I suspect, however, that responding to illegitimate focused attention with alarm, discomfort, and pain, might actually have an ancient biological origin. And other privacy scholars have had similar intuitions . Alan Westin, for

example, writing over a generation and a half ago offered a very contemporary sounding socio-biological account of privacy.

Man likes to think that his desire for privacy is distinctively human, a function of his unique ethical, intellectual, and artistic needs. Yet studies of animal behavior and social organization suggest that man's need for privacy may well be rooted in his animal origins, and that men and animals share several basic mechanisms for claiming privacy among their fellows.⁵⁴

It would be surprising were we not genetically predisposed to register the focused attention of others. Many species are keenly aware of an individual organism's gaze within their own species - rivals and potential mates - and of the gaze of other species - predators and prey. Within highly complex social species like our own, the biological advantages of heightened sensitivity to the attention of others becomes even more complicated and important. One of the persistent problems, of course, for this kind of socio-biological hypotheses is how to marshal compelling evidence, a task that is certainly beyond my area of expertise. Thus, I am reduced to thought-experiment and appeals to my readers' intuitions.

Imagine that you are out to dinner and a rude stranger continues to stare at you. Imagine that the voyeur watches you in an intimate moment. Imagine that your finances or medical problems are published in the tabloids. You are pained by this. But is this simply a learned response on your part? Now culture plays a part here, but is it the whole story? A common misconception is that nature and nurture offer rival accounts of behavior and other phenotypical

characteristics. But any evolutionary theorist will tell you that nature and nurture always work as partners in explaining anything of interest in the biological world. We know, for example, that the disposition to sing has clear genetic origins in song birds. The fact remains, however, that they must learn how to sing. If individuals are not exposed to the songs of their own species in their youth, they are doomed to the production of pitiful sounds that are at best a poor parody of the beautiful and individually unique compositions of their socially trained fellows.⁵⁵ Our culture teaches us a lot about personal privacy. I take that as a given. But it is not unreasonable to speculate that the experience of pain that normal human beings experience when they are victims of illegitimate focused attention of others is partly biological. And this will be true even if it is our culture that largely defines the boundaries of what is legitimate and illegitimate, and even if we are capable of learning to live with lots of focused attention in our daily lives.

One clear reason, therefore, for circumscribing general liberty and placing moral and legal restrictions on certain kinds of focused attention is that it causes harm to others when their privacy is not respected. We place moral, common law, and criminal restrictions on punching people in the nose largely because it hurts so damn much to be a victim of one of these punches. It doesn't really matter whether the pain of being the victim of illegitimate focused attention is more like my frustrations with my bosses, or more like the songbird with a genetic predisposition to sing. Whatever the origins of the pain we feel when our privacy is violated, a world that avoids this pain is much better than one that

allows it. And, as with almost every insight in the privacy literature, this one's been around for a long time.

The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition.⁵⁶

C. Privacy and Social and Political Freedom

None of us would desire to live in a world of complete privacy. I am not imagining, here, Gavison's perfect privacy, which we saw was nothing more than complete isolation. Rather, the thought-experiment is one of total immunity from the focused attention of others. The reason we would not want such immunity, of course, is that complete privacy seems a causally sufficient condition for complete freedom, and complete freedom sounds an awful lot like a Hobbesian state of nature. None of us trust our comrades enough to grant them total freedom.

This obvious line of thought has led some scholars to wonder just how normatively valuable privacy is in the first place. Don't these immunities simply provide a shield that furthers the cause of crime, sexual and spousal abuse, and other sorts of social and moral evil? It is undeniable that there is a tangible social cost to the robust recognition of areas of immunity from the judgment and focused attention of others. People will, no doubt, take advantage of the privacy of their homes, or their relationships, or their conversations, or their e-mail exchanges, to do things that we not only wish they would not do, but which

moral and legal rules proscribe. But most of us, including the most outspoken communitarian and feminist skeptics, see independent value in personal privacy. The reason is obvious. The privacy which allows crime and wrong to take place away from the focused attention of the rest of us, also allows individual liberty and autonomy to flourish. The world is better with some real privacy in it because the world is better when individuals have some genuine freedom.

Forward-looking justifications of privacy in terms of freedom and autonomy are common in the literature. The virtues of political and legal liberty have received the lion's share the scholarly attention. This makes sense because the focused attention of government on an individual's behavior is so tangible. We all know how driving patterns on the interstate are changed when others see the trooper's patrol car. Now speeding is a bad thing, and the focused attention of law enforcement on speeders is far from illegitimate, but when that same attention is focused on other aspects of our lives, most of us are uncomfortable. Government's attention is often judgmental - is this criminal, or subversive, or otherwise socially undesirable? Most of this judgmental attention is a good thing; that's why we have the laws and police officers in the first place. But liberal societies insist that individuals be granted certain areas of immunity from this official focused attention. We grant these areas of legal, constitutional, and moral immunity at least in part because we value freedom and autonomy within these areas.

As worrisome as the illegitimate focused attention of legal and political authority is, however, it is probably not the greatest threat to individual liberty.

This point has been made time and again in the literature, but remains all too easy to forget. John Stuart Mill saw it clearly.

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant - society collectively over the separate individual who compose it - its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates; and if it issues wrong mandates instead of right, of any mandates at all in things which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.⁵⁷

Mill's famous solution to the problem of tyranny of the majority was to articulate a limit on both social and legal mandates - the behavior and choices proscribed had to run a real danger of causing harm to others. But Mill's problem from the very beginning was that almost any behavior has some potential harmful effect on others. And since it is the majority who is doing the alleged tyrannizing, this majority of citizens have already registered their judgment that the proscribed behavior constitutes a tangible social threat. Thus, Mill's protection evaporates to an empty limit on social and legal constraints on freedom and choice.

Perhaps the recognition of personal privacy is a more efficient means of filtering out the inappropriate judgments and proscriptions of society. Greater individual liberty and autonomy will exist in a society that recognizes immunity from the illegitimate focused attention of others. This is precisely the forward-

looking normative justification of personal privacy that was presented in Ferdinand Schoeman's insightful last work.⁵⁸ He fully concedes the importance of a closely connected social arrangement that will necessarily include what I am calling the focused attention of others. Such a society is necessary, among other things, for the very preconditions of liberty and autonomy.

Much of what is most important about our life would be lost, would be inaccessible to us, were we uninfluenced - unpressured, if you will - by what we see around us. Most, if not all, of our effectiveness as social agents would be undermined by the elimination of the kinds of pressures and influences that philosophers in the analytic tradition treat as rationally corrupting. . . . Most of our protections from a monolithic social and political tyranny depend on participation in associations. The survival and effectiveness of these associations presuppose the availability of forces to bring about conformity with group norms - forces such as loyalty to group participants, methods, and ends.⁵⁹

Granted that social pressure is a good thing in both the culture as a whole, and in smaller associations like family and friends. Focused attention helps produce adherence to group-defined norms. At the same time, however, too much focused attention produces blind conformity and a loss of individual autonomy. According to Schoeman, the most important function of personal privacy is to regulate the fine line between the appropriate social pressure that produces order and genuine associations, and the excessive social pressure that precludes freedom and autonomy. And as important as it is to have immunity from legal and governmental pressure, immunity from a more amorphous social pressure is even more crucial to genuine social freedom and individual liberty.

I aim to understand the dimensions of privacy that arise in our social encounters. I argue that privacy in the contexts of our social relations protects us from social overreaching - limits the control of others over our lives.⁶⁰

This sort of forward-looking functional account of the value of privacy conventions does not, of course, imply any sort of conscious awareness of the salutatory effects on the part of anyone. The subtle forces of cultural selection, just like many of the factors in natural selection, may operate at levels far removed from the cultural and normative justifications familiar to most members of the society, or even to humanists and social scientists producing scholarly analyses of the conventions. The beauty of an account such as Schoeman's "overreaching hypothesis" is that it allows us to get a glimmer of the cultural mechanisms that must have been at work, even though it is hard to imagine any conclusively confirming data to be discovered, or any crucial experiment to be conducted.

X. Backward-Looking Justifications of Privacy

By insisting that there are personal boundaries that the state may not overstep, interior regions into which it cannot penetrate, liberalism expresses its respect for the inherent dignity, equality, individuality, interiority, and subjectivity of the individuals who compose it. Inviolability is a form of equality; people who are less than equal are people who can be violated. A liberal state respects the fact that each individual has some precious and incommensurable inner essence that must be protected from official scrutiny.⁶¹

A. Backward-Looking Perspectives on Legal Rules

Much of the literature on the moral significance of privacy seeks to expand on the forward-looking, or consequentialist, justifications just discussed. Almost every theorist will grant that there is pain engendered by illegitimate focused attention, and that the absence of privacy is contingently related to diminished personal freedom and autonomy. Many scholars, however, suggest that there is something deeper at stake in our concern with privacy. The recognition of areas of immunity from the illegitimate focused attention of others may result in a world where there is less pain, and more freedom, but this immunity has other, perhaps more profound, normative virtues. The literature claims, for example, that privacy is connected with "man's spiritual nature,"⁶² that it provides "moral capital" for the formation of significant personal relationships like friendship and love,⁶³ that it is fundamental to human intimacy,⁶⁴ and it "is a social ritual by means of which an individual's moral title to his existence is conferred."⁶⁵ All of these fascinating, and often profound, normative analyses seem to me to have, despite their often explicit rejection of consequentialism, a forward-looking orientation to rules. They all attempt to blend moral insights, facts about social psychology, and phenomenological reflections on privacy and its violation, and to then explain why a world that respects areas of limited immunity from the focused attention of others is better than a world without such privacy protection. In a sense, however, they simply provide additional detail supporting the general forward-looking considerations of protecting individuals from pain, and facilitating greater personal autonomy and freedom.

B. Respect for Persons

Kant's famous categorical imperative, in its second articulation, reads as follows.

Act so that you treat humanity, whether in your own person, or that of another, always as an end and never as a means only.⁶⁶

Kant recognized that there was something special, both psychologically and normatively, about human beings. Simply in virtue of being a part of humanity, people are entitled to special moral consideration. Although we all treat each other as means to our ends, the categorical imperative requires that we also treat one another as an "ends" as well. We are required, so says Kant, to recognize that individuals are psychologically unique, having their own dreams and fears, and that they are agents acting out their own lives according to their own choices, values, and goals. Human beings are persons, in a philosophically technical sense, and they are entitled to respect simply in virtue of this special characteristic of personhood.

A number of contemporary scholars have suggested that the Kantian principle of respect for persons gets at the normative heart of personal privacy.⁶⁷ Granted there all sorts of forward-looking advantages to granting immunity from the focused attention of others, but the underlying moral claim is grounded on the simple fact that we are people, and that personal privacy is one of the rights we have for this reason alone.

A principle of respect for persons is generated from an underlying notion of personhood. Because a human possesses certain morally significant traits of

personhood, she is entitled to be treated with respect with regard to those traits. These traits have been characterized in a variety of ways (e.g., self-consciousness and moral agency), but the characteristic that has been brought to the forefront of privacy theory is the human capacity for rational choice. Given that an agent possesses that capacity, it follows that she has a justified moral claim to being treated with the respect due to a person.⁶⁸

The Kantian insight is to some degree an empirical hypothesis. Cognitive psychology, sociology, as well as common human experience, combine to tell a familiar story. We are not only a conscious species, but a self-conscious one. We learn very early in life to be aware, not just of the world and the others who share it, but of ourselves, and what others are thinking about us. The focused attention of others causes us to become aware of ourselves. This is often a good thing. But there are occasions where it's very bad indeed. In the first place, it causes pain. Secondly, it interferes with free agency. Remember the interruption of traffic patterns on the interstate when drivers see the state patrol car, or reflect on your own disinclination to sing along with your favorite CD when others are present. All of this, of course, is the forward-looking package of considerations that lie hidden in our cultural, and perhaps biological, history, and that at least partially explain the origins of our limited immunity from the illegitimate focused attention of others. But the conventions, the normative rules, and the laws which codify this immunity are firmly in place now, and help to define what it is to be a full-fledged person in this culture. Simply because of the kind of moral, social, and biological entities we are, we are worthy of respect and dignity, including limited sanctuary from the focused attention of others.

C. Disrespect, Insult, and the Value of Privacy

A common theme in the privacy literature is that the normative virtues of privacy can be articulated in terms of the backward-looking values of respect for persons and human dignity. I want to exploit this insight by focusing on those cases where our privacy has been violated, and try to understand the moral attitudes of victims of illegitimate focused attention by others. They were not accorded the respect that our culture demands for any human being. They were, I suggest, insulted in a fundamental way that strikes at the heart of human dignity.

Understanding privacy violations in terms of disrespect, insult, and the denial of basic dignity allows us to explain a number of puzzling features of personal privacy. There are a range of different ways in which one can be the victim of illegitimate focused attention by others, and yet not suffer tangible economic or psychological damage. One way is to be indifferent to the insult. My students may call me old fashioned and inflexible, intending it as an insult. But I may react with amusement, even pride. My local supermarket probably focuses illegitimate attention on my grocery and liquor purchases by requiring the scanning of my "club card" in order to receive discounts. In the right frame of mind, I could take great offense at this. But as a matter of fact, I just don't care that much. We are puzzled, even troubled, by victims of physical assault who don't defend their rights. But we admire individuals who can laugh off the casual insults of their neighbors or fellow drivers. I'm not suggesting that we should either be troubled by victims of illegitimate focused attention of others

who do not take offense, or that we should admire them. We shouldn't be surprised, however, that there will be some real variance in the individual sensitivity to, and tolerance of, privacy violations.

A second way that individuals can escape tangible loss when their privacy is violated is to be blind to the illegitimate focused attention. Perhaps my colleagues continually insult me behind my back, but I am neither angered or saddened because I never find out. One's privacy can egregiously be violated, yet suffer no pain or embarrassment, because of blissful ignorance. Most of us have a strong intuition, however, that regardless of the absence of pain, self-consciousness, or personal or professional disadvantage, victims of unknowing privacy violations have been wronged just the same.

But respect for persons will sustain an objection even to secret watching, which may do no actual harm at all. Covert observation-spying-is objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice. . . . C is unaware of A. . . . the significance to him of his enterprise, assumed unobserved, is deliberately falsified by A. He may be in a fool's paradise or a fool's hell; either way A is making a fool of him.⁶⁹

The disrespect hypothesis also beautifully accounts for the clear cultural component of personal privacy. What actions, gestures, and words, constitute an insult is clearly a matter of convention. This in no way softens the pain, or the moral importance, of the insult. One can easily imagine a culture where raising the middle finger is understood to communicate - "You're number one, you're the best." Not in our culture, however. The areas of our lives where we

expect immunity from the focused attention of others is no cultural, or biological, universal. But given a particular culture where these expected areas of immunity exist, it is easy to see why the failure to honor this immunity counts as an attack on the victim's moral core.

Finally, understanding privacy violations as egregious instances of disrespect that strike at the core of an individual's basic dignity allows us to see these insults can be so offensive, even though the person loses little. The legislators in the state of Oregon a few years back floated the idea of requiring all state employees, including university professors, to submit to random drug tests as a condition of employment. Now, no doubt, some of my colleagues had something to hide. Their lifestyles were potentially threatened. Their loss of privacy was going to result in a quite tangible personal loss, their job, or their chosen form of recreation. For most of us on the faculty, however, the days were long since past when drug tests would disclose anything incriminating. Nevertheless, we all felt profoundly offended by the proposed policy. How dare the state, our bosses, put us in a position of having to prove our innocence. We felt that the contents of our bodily fluids was an extremely intimate area of our persons where we were entitled to immunity from the focused attention of others. Most of us were troubled by this misguided potential policy, not because we had something to hide, but precisely because we were honest, hard-working, state employees, who felt that our employers owed us trust and respect.

To violate a person's privacy, to illegitimately focus attention on protected areas of their lives, is to show them great personal disrespect. It is to insult

them, and in extreme cases, to subject them to a form of assault. These violations often produce great personal pain. But it is not the pain that makes them wrong from the backward looking perspective. It is rather that because the violations are so clearly wrong, the victims often feel pain. Privacy conventions establish a kind of trust between people. Failing to respect these conventions is, therefore, a breaking of trust - a kind of cheating. The voyeur, the paparazzi, the causal snoop, and the unscrupulous legal official, are engaged in an offensive form of injustice. The rules exist, others play by them, and they have taken advantage of the rules for their own benefit, but have ignored them as applied to others. Like all forms of moral offense, the backward looking perspective seeks some way of redressing this past injustice. The sad truth is, of course, that contemporary American law's means of addressing these past violations of personal privacy - jail, civil damages, the exclusionary rule, etc. - are all imperfect devices of rectifying the insult and assault that victims have experienced.

ENDNOTES

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- ¹ *Olmstead v. United States*, 277 U.S. 438 (1928) (Justice Brandeis, dissenting).
- ² Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220. Reprinted in Ferdinand D. Schoeman, editor, *Philosophical Dimensions of Privacy: An Anthology* (Cambridge, U.K.: Cambridge University Press, 1984).
- ³ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Justice Black, dissenting).
- ⁴ *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir. 1956).
- ⁵ W. A. Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs*, 12 (1983), pp. 258-9.
- ⁶ Alan F. Westin, *Privacy and Freedom* (New York: Atheneum Press, 1967), p. 7.
- ⁷ Parent, *op. cit.*, p. 269.
- ⁸ *Ibid*, p. 270.
- ⁹ *Ibid*.
- ¹⁰ *Ibid*.
- ¹¹ *Ibid*, pp. 270-1.
- ¹² Inness, *op. cit.*, p. 64.
- ¹³ Judith DeCew, *In Pursuit of Privacy* (Ithaca: Cornell University Press, 1997), p. 34.
- ¹⁴ Richard Wasserstrom, "Privacy: Some Arguments and Assumptions," in Richard Bronaugh, editor, *Philosophical Law* (Westport: Greenwood Press, 1978). Reprinted in Schoeman, *op. cit.*
- ¹⁵ *Eisenstadt v. Baird*, 405 U.S. 479, 486 (1972).
- ¹⁶ Jeffery L. Johnson, "Constitutional Privacy," *Law and Philosophy* 13 (1994):161-93. See, also, Jeffery L. Johnson, "Privacy and the Judgment of Others," *Journal of Value Inquiry* 23 (1989): 157-68; and "A Theory of the Nature and Value of Privacy," *Public Affairs Quarterly* 6 (1992): 271-88.
- ¹⁷ Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), p. 285.
- ¹⁸ *Eisenstadt v. Baird*, 405 U.S. 479, 486 (1972).
- ¹⁹ Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs*, 4 (1975). Reprinted in Schoeman, *op. cit.*, p. 272.
- ²⁰ *Ibid*, p. 281.
- ²¹ *Ibid*, p. 276.
- ²² *Ibid*, p. 279.
- ²³ *Ibid*, p. 286.
- ²⁴ DeCew, *op. cit.*, p. 61.
- ²⁵ Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, 1968), p. 31-2.
- ²⁶ Ruth Gavison, "Privacy and the Limits of the Law," *Yale Law Journal* 89 (1980): 421-71. Reprinted in Schoeman, *op. cit.*, p. 347.
- ²⁷ *Ibid*, pp. 349.
- ²⁸ *Ibid*, pp. 350-1.
- ²⁹ *Ibid*, p. 358-9.
- ³⁰ See, for example, Charles Fried, "Privacy," *Yale Law Journal*, 77: 475-93 (1968); and James Rachels, "Why Privacy Is Important," *Philosophy and Public Affairs*, 4 (1975). Both these important articles are reprinted in Schoeman, *op. cit.*
- ³¹ Gavison, *op. cit.*, p. 348.
- ³² *Ibid*, p. 350.
- ³³ *Ibid*, p. 354.
- ³⁴ *Ibid*, p. 351.
- ³⁵ *Ibid*.
- ³⁶ *Ibid*, p. 354.
- ³⁷ *Ibid*.
- ³⁸ *Ibid*.

³⁹ *Ibid*, p. 353.

⁴⁰ Stanley I. Benn, "Privacy, Freedom, and Respect for Persons," *Nomos XIII: Privacy* (1971): 1-26. Reprinted in Schoeman, *op. cit.*, p. 223-4.

⁴¹ Rachels, *op. cit.*, p. 292.

⁴² DeCew, *op. cit.*, p. 62.

⁴³ The connection between privacy and focused attention has been noticed other places in the literature, but, usually as a kind of aside. Consider, for example Stanley Benn's observation - "[f]inding oneself the object of scrutiny, as the focus of another's attention, brings one to a new consciousness of oneself, as something seen through another's eyes." Benn, *op. cit.*, p. 297. I was also surprised to discover that my friend and colleague, Donald Crowley and I had also seen the connection a decade and a half ago. "[P]rivacy might be viewed as culturally defined areas of immunity from being the subject of others' attention. The generic terms "others" and "attention" are particularly useful. They include the systematic judgment, in a normative or legal sense, of a whole culture or legal system. They can also include the isolated gossipy attention of the individual who listens in on a party line." Donald Crowley and Jeffery L. Johnson, "Balancing and the Legitimate Expectation of Privacy," *Saint Louis University Public Law Review*, VII: 337-58 (1988), p. 354.

⁴⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁵ *Eisenstadt v. Baird*, 405 U.S. 479, 486 (1972).

⁴⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Justice Black, dissenting)

⁴⁷ Parent, *op. cit.*, pp. 273-4.

⁴⁸ Gavison, *op. cit.*, p. 358.

⁴⁹ Innes, *op. cit.*, p. 18.

⁵⁰ John Rawls, "Two Concepts of Rules," in *Collected Papers* (Cambridge, U.S.: Harvard University Press, 1999): 23.

⁵¹ See, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977; and *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

⁵² Rawls, *op. cit.*, p. 147 (my emphasis).

⁵³ Benn, *op. cit.*, p. 225.

⁵⁴ Westin, *op. cit.*, p. 56.

⁵⁵ Susan Blackmore, *The Meme Machine* (Oxford: Oxford University Press, 1999).

⁵⁶ Warren and Brandeis, *op. cit.*, p. 76.

⁵⁷ John Stuart Mill, *On Liberty*. Edited by David Spitz (New York: Norton, 1977), p. 7.

⁵⁸ Ferdinand David Schoeman, *Privacy and Social Freedom* (Cambridge, U.K.: Cambridge University Press, 1992).

⁵⁹ *Ibid*, p. 3.

⁶⁰ *Ibid*, p. 1.

⁶¹ Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000), p. 219.

⁶² Warren and Brandeis, *op. cit.*

⁶³ Freid, *op. cit.*; and Rachels, *op. cit.*

⁶⁴ Inness, *op. cit.*

⁶⁵ Jeffrey Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs*, 6 (1976). Reprinted in Schoeman, *op. cit.*, p. 310.

⁶⁶ Immanuel Kant, *Foundations of the Metaphysics of Morals*. Translated by Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), p. 47.

⁶⁷ See, Benn, *op. cit.*, Reiman, *op. cit.*, and Inness, *op. cit.*

⁶⁸ Inness, *op. cit.*, p. 102.

⁶⁹ Benn, *op. cit.*, p. 230.